STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

In The Matter Of:	)	
	)	
ALLANA S. THOMAS,	)	
	)	
Complainant,	)	Charge Nos. 1994SF0764
	)	1991SF0462
and	)	EEOC No. 21B942051
	)	ALS No. 7749(S)
CATERPILLAR, INC.,	)	
	)	
Respondent.	)	

ORDER AND DECISION

March 21, 2005

The Commission by a panel of three:
Commissioners Arabel Alva Rosales, Dolly Hallstrom and Yonnie Stroger, presiding.

On review of the recommended orders of Kelli L. Gidcumb, Administrative Law Judge.

For Complainant: Patricia C. Benassi
Benassi & Benassi, P.C.

For Respondent: Michael A. Warner
Seyfarth Shaw

Illinois Human Rights Commission: James E. Snyder, General Counsel,
Matthew Z. Hammoudeh, Asst. General Counsel.

This matter comes before the Commission pursuant to a Supplemental Recommended Order and Decision issued by Administrative Law Judge Kelli L. Gidcumb and the exceptions and response filed thereto.

On review of Judge Gidcumb's recommendations, the public hearing record and the exceptions and response filed by the parties and for the reasons set forth herein, the Supplemental Recommended Order and Decision is sustained in part and reversed in part and is incorporated herein as our Order & Decision.

I. Nature of the Case

Allana Thomas (Complainant) alleged that Caterpillar, Inc. (Respondent) discriminated against her because of her sex when it declared her unable to perform the duties of a radial drill operator. The Complainant was initially hired by the Respondent in 1974 and worked until a reduction in force (RIF) in 1982.

The Complainant was laid off in a RIF on February 8, 1991. If the Complainant had not been job failed on the radial drill, she would have been laid off on March 4, 1991. The Complainant was recalled on March 28, 1994. If the Complainant had not been job failed she would have been recalled on December 13, 1993.

II. Proceedings

Following a public hearing, Administrative Law Judge Denise Church issued a Recommended Liability Determination and a Recommended Order and Decision. Judge Church found that the Respondent discriminated against the Complainant during radial drill training but noted that although she entered a finding of liability against the Respondent, damages were conditioned upon the Complainant's successful completion of a non-discriminatory training program on the radial drill.

Exceptions were filed and the Commission reviewed the matter.

On May 31, 2000, the Commission entered an Order and Decision and affirmed Judge Church's determination that the Respondent discriminated against the Complainant based on her sex during her training on the radial drill. The Commission noted that a unique situation arose; the radial drill position had been virtually eliminated at the Respondent. The condition the Complainant was to meet in order to receive her back pay award, successful completion of a non-discriminatory training program, had become impossible.

The Commission remanded this issue to the Administrative Law Section to determine if the Complainant was capable of successfully completing non-discriminatory radial drill training.

On remand, Judge Kelli L. Gidcumb entered a Supplemental Recommended Order and Decision. Judge Gidcumb concluded that the Complainant failed to prove that she would have qualified for the radial drill operator position in the absence of sex discrimination.

The Complainant filed exceptions and the Respondent filed a response.

III. Analysis

In reviewing an Administrative Law Judges' Recommendation Order and Decision, the Commission does not conduct a *de novo* review of the evidence; rather, the Commission will adopt the Judge's findings unless they are contrary to the manifest weight of the evidence presented at the hearing. 775 ILCS 5/8A-103(E)(2). The Commission reviews a question of law *de novo,* and is empowered to modify, reverse, or sustain the Judge's recommendations in whole or in part. 775 ILCS 5/8A-103(E).

The Commission has held, and the manifest weight of the evidence supports the determination that the Respondent discriminated against the Complainant on the basis of her sex during the Complainant's radial drill training. Judge Church's Recommended Order and Decision entered on December 15, 1998 provides that the Complainant's backpay award and instatement be conditioned on her successful completion of radial drill training. Subsequent to this recommendation, radial drill training became obsolete at the Respondent. Upon review of that issue, the Commission entered an Order on May 31, 2000 sustaining the liability finding of unlawful discrimination yet conditioned backpay on the Complainant's demonstration that she would have been able to perform the duties of a radial drill operator if she had received equal training.

The Complainant argues that Judge Gidcumb's Supplemental Recommended Order and Decision should be reversed because the Complainant established that she would have passed nondiscriminatory training. The Complainant argues that her performance, skill and ability during her discriminatory training period compared to other workers who did not experience discrimination demonstrates that she would have been able to pass radial drill training. The Complainant further argues that the only credible witness testimony (Gary Pasley and the Complainant) establishes that the Complainant would have passed radial drill training.

The Complainant argues that the Commission determined that she was discriminated against by being job failed after being subjected to a discriminatory training period and that it is now impossible for her to now undergo a second training period. Further, the Complainant argues that the Respondent should not benefit from its discrimination and any doubts as to the sufficiency of the evidence should be weighed against the Respondent.

The Respondent argues in response that a majority of the evidence and testimony cited by the Complainant is the same evidence that was presented at the initial public hearing with Judge Church. The Respondent further argues the evidence presented did not establish that the Complainant would have successfully completed a training period absent discrimination and provided testimony of Robert Ford, the Complainant's supervisor, to support this contention.

Employment Discrimination

Sections 2-102(A) and 1-103(Q) of the Illinois Human Rights Act (Act) make it unlawful for an employer to make promotional decisions regarding an employee on the basis of his sex. 775 ILCS 5/2- 102(A). In construing and applying the Act, Illinois courts have long followed federal cases interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e (2003)). See, for example, *Zaderaka v Illinois Human Rights Comm'n*, 131 Ill2d 172, 178-79, 545 NE2d 684 (1989) (applying federal courts' allocation of burden of proof).

The burden of proof in cases arising under the Act is clear as Illinois has adopted *McDonnell Douglas Corp v Green*, 411 US 792, 93 SCt. 1817 (1973). See *Zaderaka*, 131 Ill2d 172, 545 NE2d 684 (1989). The complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Once the complainant has done so, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the complained-of adverse action. The burden then shifts back to the complainant to show that the respondent's articulation was a mere pretext for unlawful discrimination. See *Texas Dep't of Community Affairs v Burdine*, 450 US 251, 101 SCt 1089 (1981).

Typically to establish a *prima facie* case of sex discrimination in a failure to hire situation, the Complainant is required to prove: 1) she is a member of a group protected under the Act; 2) she applied and was qualified for the job for which Respondent was seeking applicants; 3) despite those qualifications, she was rejected for employment; and 4) after the Complainant's rejection, the position remained open and the employer sought other applicants with similar or lesser qualifications, or the position was subsequently filled by a person not in the Complainant's protected group. See *McDonnell Douglas*, 411 US at 802, 93 SCt at 1824. However, this test is not exclusive; a *prima facie* case of discrimination may be established by direct evidence that similarly situated employees of a different sex were treated more favorably. *Loyola University of Chicago v Human Rights Comm'n,* 149 IllApp3d 8, 18, 500 NE2d 639, 645- 46 (1st Dist 1986); *Board of Regents for Regency Universities v Human Rights Comm'n*, 196 IllApp3d 187, 142 IllDec 632 (4th Dist 1990).

An employer may not apply an employment qualification unevenly depending upon the sex of the applicant. See *Loyola University*, 149 IllApp3d 8, 500 NE2d 639 (1st Dist 1986). The Complainant alleged that she was adversely affected by differential treatment during the course of her training on the radial drill. The manifest weight of the evidence supports Judge Church's findings that the Complainant was treated differently because of her sex and that she established a *prima facie* case *of* discrimination. Judge Church relied upon the extensive testimony showing that a male comparative, Luis Legaspi, was treated more favorably in his training than the Complainant; that she was required to work on malfunctioning machines, while the male trainee was not; that she was forced to train on at least five different machines, while her male counterpart only worked on two; that she was not provided instruction on how to use the drill more efficiently or on common tactics for handling the machinery; that she was assigned to watch two set ups, thereby

reducing her production time, while her male counterpart did not participate in set ups until after she was job failed; that she was singled out for violating a "two in the aisle" rule while at the same time two male employees who were also violating the rule were not admonished. Judge Church noted that both her immediate supervisor and plant supervisor showed discriminatory animus toward females.

We agree with Judge Church and also find that the Complainant established a *prima facie* case of discrimination based on her sex so as to require the Respondent to articulate a legitimate, non-discriminatory reason for the adverse action.

The Respondent contends that the Complainant lacked the necessary skill and ability to satisfactorily complete the jobs under the collective bargaining agreement. The Respondent articulated that the machines used by the Complainant and Legaspi were similar; that observing multiple set ups actually helps a new operator; that the Complainant received much more instruction than Legaspi; and that an operator must work on a malfunctioning machine because he or she must learn to use all the machines.

Since the Respondent articulated a legitimate, non-discriminatory reason for the complained-of adverse action, the burden then shifts back to the Complainant to show that Respondent's articulation was a mere pretext for unlawful discrimination. A complainant may establish pretext by showing either that (1) the employer's explanations are not worthy of belief; (2) the proffered explanation had no basis in fact; (3) the proffered explanation did not actually motivate the decision; or (4) the proffered explanation was insufficient to motivate the decision. *Sola v Illinois Human Rights Comm'n,* 316 IllApp3d 528, 249 IllDec 712 (1st Dist. 2000).

Judge Church noted that Webster, the ultimate supervisor in the situation, felt that women should not be radial drill operators and had a say in the Complainant's job failure. Webster stated that "you know about Allana, I'm actually doing her a favor. These jobs aren't for women, not this radial drill." Judge Church found his unrebutted statement to be evidence of discriminatory animus towards females. Judge Church ultimately concluded that the Respondent's explanation for subjecting the Complainant to unequal training on the radial drill to be a pretext for unlawful discrimination. We agree.

The matter was remanded to determine if the Complainant could have successfully completed radial drill training absent unlawful discrimination. Our view may be more simple than that of our predecessors on this Commission. Due to the Respondent's belief that "(t)hese jobs aren't for women", the Complainant did not receive the same training as her male comparatives. Judge Gidcumb and the parties proceeded by the May 31, 2000 Order of the Commission requiring the Complainant to put forward proof. That proof is sufficient.

The Complainant worked for the Respondent for over ten years and operated numerous machines during her employment, including a hydro-form press, punch presses, spray guns, automatic sprayers, power trucks, sand blasters and a broach machine (2Tr-11-12,

6Tr-34, SROD FF No.11). The Complainant had no difficulty learning how to operate any machine while employed by the Respondent (2Tr-13). The most complicated machine the Complainant was assigned to operate was the broach, a large machine whose function was to cut steel rods (2Tr-11). The Complainant learned how to operate three types of broach machines (2Tr-11). The broach machine and the radial drill are classified as Level II machine jobs in the collective bargaining agreement. (6Tr-88, 2Tr-15-16). Ford, the foreman of the department, admitted that the jobs are classified based on what the company and the union have agreed the level of skill is required to do the job. (6Tr-88). He admitted that a Level II job is considered a low level job requiring a low level of skill (5Tr-88).

The Complainant and Legaspi, a male, were assigned at the same time to the same shift and department under the supervision of Ford. Similar to the Complainant, Legaspi had no previous experience operating radial drills. (4Tr-49-52). Ford did not give any instruction on the operation of the radial drills (2Tr-20). The Complainant was assigned to work with an experienced radial drill operator, Gary Pasley. There were three witnesses who testified regarding the Complainant's ability with respect to operating a radial drill: Pasley, Ford and the Complainant.

Ford testified that the Complainant could not have passed non-discriminatory training on the radial drill. Judge Church found that Ford actions toward the Complainant showed discriminatory animus where she noted that "Ford signing out Complainant regarding the 'two in the aisle' rule when two men were also violating the rule, and his condescending manner towards the Complainant also show discriminatory animus". (RLD at 16, 22).

Pasley was assigned to teach the Complainant to operate the radial drill. (1Tr-168; 5Tr-16). He testified that the Complainant had no difficulty understanding what he taught her or learning to operate the radial drill (1Tr-168-169) and that the Complainant had the skill and ability to operate the drill (1Tr-183). Pasley testified that the Complainant did fine running the radial drill (1Tr-183) and that if she had been trained under the same conditions as Legaspi, she would have been successfully able to operate a radial drill (6Tr-21-22).

The Complainant testified that she operated a number of machines in her career including a broach machine that was a level II job like the radial drill and had a similar level of difficulty (2Tr-15-16; 5Tr-88). The Complainant testified that she did not have any difficulty understanding the radial drill training and that she would have qualified on the radial drill if she were given the same training as her male counterpart. (6Tr-35-37).

Our May 31, 2000 Order put Judge Gidcumb and the parties in an unusual position. Employment discrimination under the Act prohibits using sex for "recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment", 775 ILCS 5/2-102(A) (emphases added). It is undisputed that the Complainant was eligible to be trained and eligible to be tested. The Complainant may have succeeded in non-

discriminatory training; however, there is a chance that she may have failed. As a result of the Respondent's discriminatory actions, we will never know if the Complainant could pass non-discriminatory training on the radial drill, as it is now obsolete. No one can know how she would have performed in training if she had not been discriminated against let alone prove it by evidence. The Complainant proved that the female candidate did not have the same opportunity as the males, because she is female. On this basis, without more, the Complainant is entitled to recovery.

In *Albemarle Paper Co v Moody*, 422 US 405, 421, 95 SCt 2362 (1975), the Supreme Court held that:

> (G)iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination. (footnote omitted).

The Act strives to make victims of unlawful discrimination whole; therefore, an award of backpay to a victim of unlawful discrimination is consistent with the statutory purpose of the Act. Even if ambiguity exists as to whether the Complainant could have successfully passed radial drill training, any ambiguity as to whether the Complainant would have passed a non-discriminatory training period has been created by the Respondent's discrimination during the training process. When the Respondent has attempted to prove the existence of a nondiscriminatory reason for the failure to hire, but it remains uncertain whether the Complainant would have been hired in the absence of the discriminatory practice, and the uncertainty flows from that practice, the issue should be resolved against the Respondent, the party responsible for the lack of certainty. See *Stewart v General Motors Corp*, 542 F2d 445, 452 (7th Cir. 1976), cert denied, 433 US 919, 97 SCt 2995 (1977).

Although backpay is an equitable remedy and, as such, lies within the trial judge's discretion, that discretion is to be exercised with a view to " 'fashion(ing) ... the most complete relief possible.' " *Albemarle Paper Co*, 422 US at 421, 95 SCt at 2373 (quoting 118 CongRec 7168 (1972) (remarks of Sen. Williams)) (brackets in original). Accordingly, once the court has found unlawful discrimination, "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes" of ending employment discrimination and compensating its victims. *Id.* Measured against this standard, the facts do not justify denying an award.

The inability to take a new test was a result of the Respondent's discriminatory and unlawful actions. To deny an award on this basis would encourage other employers to limit the accessibility to employment tests in the hope of escaping monetary liability and would subject victims of discrimination to prolonged periods of uncertainty. Such results would plainly be incompatible with the central purposes of the Act. An award of backpay would not be a windfall to the Complainant in this circumstance; on the contrary, under the standards of the Act, denial of an award would be a windfall to the Respondent, whose posture in this appeal is that of a proven discriminator.

For the reasons stated above, the Supplemental Recommended Order & Decision issued in this case is sustained in part and reversed in part and is incorporated herein as our Order & Decision.

IT IS HEREBY ORDERED THAT:

1. Respondent clear the Complainant's personnel file from any reference to Charge No. 1991SF0462 and remove the 1991 radial drill operator job failure from the Complainant's personnel file; and

2. Respondent cease and desist from discriminating in matters of training on the basis of sex; and

3. Respondent pay to the Complainant the sum of $11,146.62 for lost wages, interest that the Complainant could have earned on her contribution to the Respondent's 401(k) retirement fund, bonus time, holiday pay and vacation pay; along with prejudgment interest (See 56 Ill. Admin. Code, ch. XI, Sec. 5300.1145); and

4. Respondent pay additional sums to pension representing the Complainant's contribution to retirement for the period of 128 days, as if the Complainant worked those days; and

5. Respondent pay to the Complainant the sum of $60, 632.00 representing attorneys' fees incurred in the prosecution of this matter; and

6. Respondent pay to the Complainant the sum of $1140.00 representing paralegal fees for work conducted during the initial hearing phase in this matter.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 21st day of March 2005.

Commissioner Arabel Alva Rosales

Commissioner Dolly Hallstrom

Commissioner Yonnie Stroger